Supreme Court of the United States

No. 72-1517

Georgia Theresa Gilmore, et al.,

Petitioners,

v.

City of Montgomery, Alabama, et al.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. HUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama, Northern

Division, is reported at 337 F.Supp. 22, and a copy of it is appended at 17a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____F.2d_____, No. 72-1610 (2-9-73) and a copy of it is appended at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. May a city provide free meeting and recreational facilities to private organizations, where such facilities are used by club members, while such organizations have a racially discriminatory membership policy?

II. Must a city under an affirmative duty to desegregate its schools avoid all aid to private segregationist academies, or is it required only to refuse aid which would substantially aid such schools?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

a. *The Proceedings Below*

This Complaint was originally filed on December 22, 1958, seeking declaratory and injunctive relief barring the restriction of City-owned recreational facilities to members of the white race. On September 9, 1959, the District Court issued a Memorandum Opinion and Judgment which declared the municipal ordinance providing for racial segregation of recreational facilities void, and ordered that the custom of denying Negroes the use of the parks in Montgomery was unconstitutional and void.

A Motion For Supplementary Relief was filed in this class action litigation on September 8, 1971. It sought a temporary and permanent injunction against the defendants which would bar their

sanctioning the use of municipal recreational facilities by any school, group or organization which was racially segregated or had a racially discriminatory admissions policy.

On December 1, 1971, the parties filed an Agreement for Submission of the Case agreeing that the case would be submitted to the Court on the pleadings filed, the answers to interrogatories and a Fact Stipulation.

On January 18, 1972, the District Court issued an order and injunction declaring the defendant City's policy and practice of permitting the use of city-owned or operated recreational facilities by any private school or private school affiliated group, which school is racially segregated or which has a racially discriminatory admissions policy unconstitutional; enjoining the defendants from in any way sanctioning the use of city-owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory

admissions policy; declaring the defendants' policy and practice of permitting the use of city-owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy unconstitutional; enjoining defendants from permitting or in any way sanctioning the use of city-owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

Defendants filed timely notice of appeal to the United States Court of Appeals for the Fifth Circuit on February 11, 1973.

The United States Fifth Circuit Court of Appeals modified in part and reversed in part on February 9, 1973. As to private segregated schools, the Court found the order of the District Court overbroad and remanded to the District Court "to make clear that the City of Montgomery is not prohibited from permitting *nonexclusive* access to

public recreational facilities and general government services by private schools or school affili groups." (Emphasis Added). The order was reversed as to the prohibition against use of public recreational facilities by private non-sch organizations which have a policy of racial segregation.

b. *The Facts*

The City of Montgomery, beginning for the first time in Fall, 1970 (Tr. 34)[1/], provided City-owned and maintained football fields to private segregated schools for use in playing competitive games.[2/] Stephens-Spear School, the

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1/ All references to the Fifth Circuit appendix are designated by "Tr."

2/ A comprehensive school desegregation orde requiring zoned attendance was handed down affecti the City of Montgomery public schools on February 1970. Up until that time, a freedom of choice pl existed that resulted in little school integratio Carr v. Montgomery County Bd. of Educ., 289 F. Su 647 (M.D. Ala., 1968), *aff'd* 395 U.S. 225 (1969); further order entered by District Court on Febru 25, 1970 unreported. *Aff'd* 429 F.2d 382 (5th Cir., 1970).

Central Alabama Academy, the Montgomery Academy and St. James School are each private segregated schools which scheduled the use of City of Montgomery Public football fields for the 1971 football season (Tr. 34 & 36).

The defendants charge no fee to private segregated schools, or any other such organization or club, but permit use of public facilities for meetings or recreational activities with only a charge for electricity at night athletic contests. The difference between the power cost and the gate receipts go to the private group or organization. (Tr. 24-26).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE LONG-STANDING ISSUES OF PUBLIC POLICY ARE AT STAKE, INCLUDING DESEGREGATION OF THE PUBLIC SCHOOL SYSTEM AND DESEGREGATION OF PUBLIC FACILITIES.

This petition presents two related issues which must be read against the background a prolonged litigation to require the City of Montgomery to desegregate its recreational facilities and its schools. The first complaint in this

cause was filed in 1959; it sought the desegregati of the City's recreational facilities, and relief was granted.[3/] In 1970 supplemental relief was requested on the grounds that equal facilities were not being provided in the black and white residential sections of the city. After one day o trial the defendants agreed to a settlement in which two million dollars would be spent to upgra facilities in black neighborhoods.[4/] In the meantime it had been discovered that the City had entered into a private agreement with the segrega local YMCA to ensure that facilities closed after the first *Gilmore* order would be provided through the YMCA to Montgomery's citizens on a segregated basis. This effort to circumvent the original

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[3/] Gilmore v. City of Montgomery, 175 F.Supp 776 (M.D. Ala. 1959), *modified*, 277 F.2d 364 (5th Cir. 1960). The City responded by shutting down its parks. *See* Smith v. YMCA, 316 F.Supp. 899, 909 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1973).

[4/] The order of the District Court is unrepo The Court stated that plaintiffs "have made an extremely strong case of denial of equal protecti Brief for Appellees, below, pp. 32-33.

Gilmore order has also been enjoined.[5/]

Read against this backdrop, it is easy to understand why the *Gilmore* plaintiffs became alarmed in 1971 when there occurred a sudden upsurge in use of public facilities by segregationist private organizations. Private segregationist academies, for example, which had previously scheduled few games in public football stadiums, took up 45% of the playing dates in 1971.[6/] Believing this new turn in events to represent a significant inhibition upon attainment of the goal of nondiscrimination in provision of public services, and also believing the use of public football fields by "white-flight" academies to

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[5/] Smith v. YMCA, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1970). *See* note 3 *supra*. While the parks had been reopened after 1960, many recreational programs normally conducted by the City (baseball, swimming) were resumed only under the segregated YMCA subterfuge.

[6/] App. 4a, n. 4. Of 31 games scheduled 14 involved all-white private schools.

frustrate the achievement of a unitary school system, the petitioners used the existing *Gilmore* case to ask for judicial relief.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT MISCONCEIVED THE PRINCIPLES OF LAW SET FORTH IN *MOOSE LODGE NO. 107 v. IRVIS*, 407 U.S. 163 (1972), AS APPLIED TO THE USE OF PUBLIC FACILITIES BY PRIVATE SEGREGATED ORGANIZATIONS.

As we have stated two issues are presented in this petition. They derive from the two alternative theories which petitioners argued to support their request for relief. First, and applicable to both school and non-school segregated organizati the petitioners argued that the City's action was in support of private racial discrimination and barred under the equal protection clause. Second, the petitioners argued that with respect to the use of public facilities by private segregationist schools, the city's provision of services should be enjoined on the narrower ground that it frustrated school desegregation.

Regarding the first argument and coverage of gationist non-school organizations, the Court of A

reversed the District Court's injunction[7] by citing *Moose Lodge No. 107 v. Irvis*.[8] The Plaintiffs contend that the City's grant of its own public lands and facilities for the use of discriminatory private organizations is substantially different from a private club's discrimination on its own premises. The *Moose Lodge* Court's treatment of *Burton v. Wilmington Parking Authority*[9] supports this view, for the Court quoted extensively from *Burton* to show that in the parking authority situation the

> "land and building were publicly owned. As an entity the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' The costs of land acquisition, construction, and maintenance are

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[7] App. 13a

[8] 407 U.S. 163 (1972)

[9] 365 U.S. 715 (1961).

> defrayed entirely from donations by the City of Wilmington, from loans and revenue and parking services out of which the loans and bonds were payable."10/

The Court went on to contrast that situation with the one before it in *Moose Lodge:*

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton* . . . Unlike *Burton,* the Moose Lodge building is located on land owned by it, *not by any public authority.*11/

It must be clear to even the most casual observer that the public football stadiums and recreational areas involved in the case *sub judice* fall within the *Burton* holding.12/ Indeed, the

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10/ *Id. quoting* Burton v. Wilmington Parking Authority, at 723-24.

11/ 407 U.S. at ____, 32 L.Ed 2d at 638, (Emphasis Added).

12/ In a sence the facts of this case are even more compelling than those in *Burton,* for there (o

Court of Appeals admitted that the instant situation was "closer to the facts of *Burton*."[13] It attempted to rule out *Burton*, however, on the grounds that the "periodic use" of public facilities by segregated groups does not come within "symbiotic relationship" required by *Irvis*.[14] But surely this misconceives *Irvis*: "one-shot" state discrimination is just as unconstitutional as a continuing relationship.[15] Indeed, where the discrimination occurs on the city's own property, one wonders whether the symbiosis concept has any place at all.[16] In short, the Court of Appeal's reliance on *Irvis* is misplaced.

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the city authority had no foreknowledge that the restaurant-lessee was going to discriminate, while the City of Montgomery very well knew that these private academies either had discriminatory admission policies or were in fact all-white.

[13] App. 15a

[14] *Id.*

[15] *See eg,* Jones v. Alfred Mayer, 392 U.S. 409; *cf.* Monroe v. Pape, 365 U.S. 167.

[16] *See* pp. 17-18, *infra*.

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN PERMITTING SOME USE OF PUBLIC FACILITIES BY PRIVATE SEGREGATED SCHOOLS.

With respect to the petitioners' second argument, the Court of Appeals ruled that the City's provision of recreational facilities to private segregationist academies did indeed frustrate court-ordered desegregation efforts.[17] Yet the test employed by the court led it to narrow significantly the scope of the district court's order. It is with this test, and its implications for relief, that the petitioners quarrel.

The Court of Appeals agreed with the petitioners' contention that because they impede desegregation efforts, white private academies should be treated as splinter school districts to which the commands of *Wright v. Council of City of Emporia*[18] would apply. The *Wright* decision rejected the Fourth

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[17] App. 9a-10a

[18] 407 U.S. 451 (1972).

Circuit's primary or substantial effect test and instead re-declared its own test: *any* action which tends to inhibit desegregation cannot be tolerated.[19/]

The Fifth Circuit's "exclusive use" test does nothing more than restate the Fourth Circuit's discredited "substantial effect" test. It allows the City to continue to provide some benefits to segregationist academies, just so long as the benefits are not provided on an exclusive basis. That contravenes this Court's repeated instructions that "[s]tate support of segregated schools through *any arrangement,* management, *funds or property* cannot be squared with" the equal protection clause.[20/]

IV. OTHERS REASONS FOR GRANTING THE WRIT.

There are reasons for granting review other than the fact that the holding below is erroneous.

[19/] *Id* at 407 U.S. at ____, 33 L.Ed 2d 61.

[20/] Cooper v. Aaron, 358 U.S. 1, 19 (1958) (emphasis supplied).

A.

The issues presented here are new and serious ones. This Court has had to deal with repeated efforts to frustrate school and government segregation in the South, and the tactics challenged in this suit are another very significant phase in that chain of litigation. The Court below referred to this case as involving a "recurrent problem of the use of public property by segregated private schools."[21/] All of the cases to which the Court of Appeals then referred have been decided since 1971. The breakthrough case to prevent city co-operation with private clubs in providing segregated recreational facilities has also been decided only recently.[22/]

B.

Guidance for the lower courts is desparately needed on the issues here presented. In dealing with its cases regarding public property for

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[21/] App. 3a

[22/] Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972) *aff'g* 316 F.Supp. 899 (M.D. Ala. 1970).

private school uses, the Fifth Circuit has floundered in an unusual sea of indecision. The court's opinion in *McNeal v. Tate County School District*, 460 F.2d 574-5 (5th Cir. 1972), was issued after a previous decision in the case had been handed down but withdrawn. Similarly, the Fifth Circuit has had trouble deciding the manner of relief to the accorded. In *United States v. State of Mississippi*, No. 72-2521 (April 11, 1973), the Court sanctioned relief which would have integrated the private school which received state property. In the case *sub judice*, the city was ordered to stop aiding such schools.

C.

The lower courts are split on what effect to give to *Moose Lodge* and how to distinguish between *Moose Lodge* and *Burton*. *Compare* the opinion of the Court of Appeals here *with Falkenstein v. Dept. of Revenue for the State of Oregon*, 350 F.Supp 887 (1972) (three judges), Appeal Dismissed 93 S. Ct. 907 (1-8-73), *Hale v. Crossroads Associates*, 469 F.2d 616 (2nd Cir. 1972) and *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638 (7th Cir. 1972), *cert den.* 93 S.Ct. 928

(1-8-73). Since the instant case and the many oth which the Fifth Circuit has faced involved city use of city-controlled land and facilities, the issues presented here are not likely to be illuminated by t Supreme Court's consideration of other state actio cases. *See Lucas v. Wisconsin Electric Power*, 466 F.2d 638 (7th Cir. 1972), *cert den.* 93 S.Ct. 928 (1-8-73); *cf Falkenstein v. Dept. of Revenue for th State of Oregon*, 350 F.Supp 887 (1972)(three judges) Appeal Dismissed 93 S.Ct. 907 (1-8-73).

D.

The "exclusive use" rationale formulated by th court below is simply unworkable. The term is nowh defined in the court's opinion. Confusion over the test is further increased because the stipulation of facts explicitly states that no exclusive use was in in the use of public football fields,[23/] and yet th Court of Appeals ruled that activity to be forbidde under its test.

Surely some accommodation of rights must be m Private school students who individually use public

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[23/] Tr. 36

libraries to do their homework should not be penalized, but what about the segregated school group which takes advantage or recreational facilities on a non-exclusive basis? The Court of Appeals' facile illustration that "[n]o schools, public or private, were shown to have constructed. . . zoos, parks, and the like,"[24] totally misses the point; for in fact neither do Montgomery public schools construct football stadiums — a common city-owned recreational facility is used. Yet the court below held private use of football stadiums to be covered by its test and decree.

E.

There may be important first amendment rights at stake in the present case. The Court of Appeals recognized, as do the petitioners, that the "freedom to choose one's associates in private clubs. . . is an important constitutional right."[25] But we cannot agree that it follows that government must provide facilities for private groups which discriminate.[26]

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[24] App. 11a.

[25] App. 15a

[26] *See Id.*

And surely the issue requires more discussion than a citation using the signal "cf." and referring to two cases which have no bearing on racial discrimination.[27] The petitoners are certain that the issue deserves considered attention, but two sentences and a "cf." citation do not resolve the matter.

CONCLUSION

For the above reasons, petitioners respectfully request that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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[27] *See* App. at 15a-16a. The court's confusion of equal protection and first amendment due process analyses is further demonstrated by its reliance upon a freedom of religion case to support its contention that a state under a duty to desegregate need not be the "adversary" of segregationist academies. App. 10a, *citing* Everson v. Board of Education, 330 U.S. 1, 18 (1947).

Respectfully submitted

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1610

GEORGIA THERESA GILMORE, ET AL,
Plaintiffs-Appellees,

versus

CITY OF MONTGOMERY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Alabama

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(February 9, 1973)

Before MORGAN, CLARK and INGRAHAM, Circuit Judges.

CLARK, Circuit Judge: The City of Montgomery makes football, basketball, and baseball facilities owned and operated by it available to private groups, including schools, churches, civic clubs and charitable organizations.[1] Plaintiffs, black residents of Montgom-

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[1]The city schedules private events on a prior reservation basis, subject to a preference given to public schools and to the Park and Recreation Board. Private organizations are granted the exclusive possession of municipal facilities during scheduled

ery, utilized this long standing class action proceeding[1] to seek an injunction against the City's practice of permitting the use of these public recreational facilities by racially segregated private schools and clubs. The district court granted an injunction, *inter alia*, prohibiting the use of city-owned recreational facilities by any private school which is racially segregated or by any private group, club, or organization, other than a private school, which has a racially discriminatory admissions policy. The full text of the order portion of this injunction is set out in the margin.[3] We hold

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contests and are allowed to set, collect, and retain admission fees. There is no charge for use of municipal baseball and basketball facilities or for the daytime use of football stadiums. A fee of 25 dollars to 60 dollars, depending on the amount of electrical lighting involved, or 5% of the gate, whichever is greater, is charged for night use of the football stadiums.

[2]The decision below is reported at 337 F.Supp. 22 (M.D. Ala. 1972). One previous opinion is reported at 176 F.Supp. 778 (M.D. Ala. 1959), *aff'd as modified*, 277 F.2d 364 (5th Cir. 1960). An interim unreported order requiring equalization of recreational facilities in black neighborhoods was entered January 21, 1971. In related litigation, the maintenance of segregated recreational programs through the subterfuge of a "private association" has been enjoined. Smith v. Y.M.C.A. of Montgomery, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972).

[3] 1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has

this order of the district court overbroad and affirm only to the extent that the City be enjoined from permitting the use of public recreational facilities for official athletic contests and similar functions involving racially segregated private schools and school affiliated groups.

I.

SEGREGATED PRIVATE SCHOOLS

A. The Facts

This case involves the recurrent problem of the use of public property by segregated private schools in school districts under court order to desegregate public schools. *Cf. Graves v. Walton County Bd. of Education*, 465 F.2d 887 (5th Cir. 1972); *McNeal v. Tate County School District*, 460 F.2d 568 (5th Cir. 1972); *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir. 1971)..

In 1964 the district court held that Montgomery schools were being operated on a segregated basis in

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a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

violation of the Fourteenth Amendment and ordered the desegregation of four grades in the fall of that year. *Carr v. Montgomery County Bd. of Education*, 232 F.Supp. 705 (M.D. Ala. 1964). *See also* 253 F.Supp. 306 (M.D. Ala. 1966) and 289 F.Supp. 647 (M.D. Ala. 1968), *aff'd* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). In August, 1969, the district court found that the freedom-of-choice plan which had been in effect since 1967 had not been effective in disestablishing the dual school system and, accordingly, the court directed the United States, through the Department of Health, Education and Welfare, to formulate a comprehensive desegregation plan for Montgomery County. This plan which would have eliminated virtually all one-race schools in the city was approved by the district court in February, 1970, and affirmed with minor modifications by this court, 429 F.2d 382 (5th Cir. 1970).

Prior to implementation of this comprehensive desegregation plan in Montgomery, there had been limited use of public stadiums and similar facilities by private schools. However, in fall, 1971, at least four private schools with all-white enrollments, each of which had expanded its enrollment and extracurricular program subsequent to the extensive desegregation of Montgomery public schools, scheduled their home football games in public stadiums.[4] One of these schools has announced that it will not enroll black students

[4]The relative proportion of public and private school usage of public athletic facilities is indicated by the schedule of football games at Goodwyn Field in Autumn, 1971: of 31 total games scheduled, 14 involved all-white private schools, 16 were contests between public school teams, and in one game the home team was a desegregated Roman Catholic School.

The others have "declared" open enrollment policies but, in point of fact, none of these private schools have Negro students enrolled.

The district court found that by allowing private schools to schedule their athletic contests in public facilities, "Montgomery is providing aid to private, segregated schools, thus encouraging and facilitating their establishment and operation as an alternative for white students who in most instances are seeking to avoid desegregated public schools. ... [T]he creation and operation of these private, segregated schools is to the detriment of a racially balanced public school system in Montgomery, Alabama." 337 F.Supp. at 24-25. Specifically, the court found that the use of public athletic facilities aids such private schools in at least three direct ways: (1) the opportunity to play athletic contests in public facilities "contributes considerably to the attractiveness" of the all-white private schools and draws white students from public schools, thus increasing the difficulty of desegregating public education; (2) the use of public facilities saves the capital outlay required to build similar facilities; and (3) the City's action in granting the schools exclusive possession of city property for the duration of the contest provides a means by which the schools can raise extra revenue through the sale of tickets and refreshments.

B. The Law Applicable to the Injunction in General

Subsequent to the implementation of a comprehensive school desegregation plan in Montgomery, new

segregated private schools were established, enrollment in existing all-white private schools increased, and simultaneously, these schools began to make frequent use of public recreational facilities for their official school functions. Because of the court's prior mandate to Montgomery to eliminate racial discrimination in education, and in light of the capacity of all-white private schools to frustrate this goal, any state involvement with such schools is subject to special scrutiny. *McNeal v. Tate County School Bd.*, *supra*, 460 F.2d at 574-75.[5] It is well established that federal courts may enjoin any state assistance to private school organizations which serves to "impede, thwart or frustrate the execution of the integration plan mandated against [a public school district]." *Aaron v. Cooper*, 169 F.Supp. 325, 336 (E.D. Ark. 1959), applying on remand the principles laid out by the Supreme Court, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 1 (1958) and the Eighth Circuit, 261 F.2d 97 (1958).[6] Also see Grif-

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[5] *Cf.* Bright v. Isenbarger, 314 F.Supp. 1382, 1392-94 (N.D. Ind. 1970), *aff'd* 445 F.2d 412 (7th Cir. 1971); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[6] In *Cooper*, the Supreme Court, referring to the actions of public officials in Little Rock, Arkansas, who were assisting the creation of a segregated private school system, declared:

> . . . the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Smith v. Texas, 311 U.S. 128, 132, 85 L.Ed. 84, 87, 61 S.Ct. 164.
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> . . . State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's com-

fin v. County School Bd., 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

The adverse effects of the creation of all-white private schools on public school desegregation have long been recognized in this circuit. *United States v. Jefferson County Bd. of Education*, 372 F.2d 836, 849 (1966), *aff'd en banc* 380 F.2d 385, *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967). More precisely, we have recognized that the departure of white students and teachers into private educational institutions disrupts planned desegregation of the public school system and causes resegregation,[7] that such "white flight" has the potential to reduce community support and resources available for public education,[8] and that resulting racial isolation perpetuates the stigma long associated with racially segregated education.[9]

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mand that no State shall deny to any person within its jurisdiction the equal protection of the laws.

358 U.S. at 17-19, 78 S.Ct. at 1409-10.

[7] *E.g.*, Boyd v. Pointe Coupee Parish School Bd., 332 F.Supp. 995 (E.D. La. 1971). See also, *e.g.*, United States v. Scotland Neck City Bd. of Education, 407 U.S. 484, ——, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972); Monroe v. Bd. of Comm. of City of Jackson, 391 U.S. 450, 459, 88 S.Ct .1700, 1705, 20 L.Ed.2d 727 (1968); United States v. Hinds County School Board, 433 F.2d 598, 601 (5th Cir. 1970).

[8] *E.g.*, United States v. Hinds County School Bd., 433 F.2d 605, 609 (5th Cir. 1970).

[9] *E.g.*, Wright v. City of Brigton, *supra*, 441 F.2d at 451; Poindexter v. La. Financial Assistance Comm., 258 F.Supp. 158, 163 (E.D. La. 1966) and 275 F.Supp. 833, 851 (E.D. La. 1967), *aff'd* 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 (1968).

Indeed, the effect of the enrollment of white children in private segregated schools is not unlike the creation of "splinter" school districts which contain proportionately more white children than the existing district. The creation of such splinter districts has been held unconstitutional where "the secession has a substantial adverse effect on desegregation of the [remaining] school district." *Lee v. Macon County Bd. of Education*, 448 F.2d 746, 752 (5th Cir. 1971). While public authorities are not required to achieve racial balance within each school within their jurisdiction, where *de jure* segregation has existed they are required to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Bd. of School Comm. of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971). Carving out a new, substantially whiter splinter school district is inconsistent with this affirmative duty. *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2166, 33 L.Ed.2d 51 (1972); United States v. Scotland Neck City Bd. of Education, 407 U.S. 484, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972).

Thus, neither through splinter public school districts nor through private school systems may officials whose community is subject to a desegregation order assist the establishment or maintenance of segregated educational systems which accomplish indirectly what the court has forbidden such officers to accomplish directly. *Cooper v. Aaron, supra; Lee v. Macon County Bd. of Education*, 267 F.Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422 (1967).

GILMORE v. CITY OF MONTGOMERY, ET AL

The district court found that by allocating exclusive possession of public recreational facilities such as football stadiums, baseball diamonds, basketball courts, and tennis courts for official athletic contests and similar functions sponsored by racially segregated private schools, the City provides a publicly supported means by which these schools may generate revenue for the support of their activities. Of more practical significance, the court found that by using existing public facilities, these schools can avoid the substantial capital investment required to build comparable facilities, as well as current expenditures for maintenance and repair.

Notwithstanding the importance of these financial benefits, we would emphasize that "this is not merely a controversy over a sum of money." *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964). In the case at bar, the district court recognized that the opportunity to use public stadiums and similar facilities for official school functions enhanced the attractiveness of segregated private schools. Students and their parents will be more attracted by a private school which, with public assistance, can offer a complete extracurricular program comparable in all aspects with that offered in public schools. Without reaching the broader issue of whether the operation of the segregated private schools themselves involves state action, we hold that the findings and conclusions of the court are supported by the record and are sufficient to sustain that portion of the injunction which forbids scheduling athletic contests and similar func-

tions which involve segregated private schools in municipal facilities.

C. The Distinction Between Exclusive and Nonexclusive User

The district court found that granting exclusive possession of public recreational facilities to segregated private schools for the purpose of official school functions will significantly affect desegregation of the public school system. Therefore, the court was well within the ambit of its equitable discretion in enjoining city officials from permitting such usage.

However, to the extent that the court's order may be read to prohibit the use and enjoyment of public recreational facilities by individual children or groups of students enrolled at private schools in common with other members of the public, we find the order to be overbroad. The children enrolled in private schools have an unquestioned right as citizens to make use of all municipal recreational facilities. The Supreme Court has pointed out that, while the Constitution requires public authorities to abstain from assisting certain private schools, "it does not require the state to be their adversary." *Everson v. Bd. of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947).

Permitting private school groups to enjoy such recreational facilities as zoos, museums, and parks or to attend, along with other citizens, civic and cultural events conducted in city recreational facilities does not involve the same degree of affirmative state action

as granting exclusive control of public facilities for private school functions. Nonexclusive use of governmental facilities and services does not provide a means by which schools may raise revenue. No schools, public or private, were shown to have constructed or maintained facilities such as zoos, parks and the like. Thus, the opportunity to make communal use of this type of recreational facility does not enable the private school to duplicate public school operations at public expense. The nonexclusive enjoyment of municipal recreational facilities by private school children was not proven to present a sufficient threat to desegregated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public.

D. Distinction Among Segregated Schools on the Basis of Declared Enrollment Policy

On appeal we are asked to make a distinction between the use of public facilities by private schools which have an announced policy of accepting only white students and by those schools which, though never having enrolled a black child, have declared an "open admissions" policy. This distinction would be inconsistent with the rationale for our limited affirmance of the injunction. The basis for the district court's action lies in its authority to prevent impediments by public authorities which hinder the accomplishment of the constitutional duty, specifically recognized in earlier orders of that court, to desegregate the Montgomery public school system. It was well within the

ambit of the district court's discretion to find that the right of black children to enjoy a desegregated public education could be frustrated as effectively when whites leave the public system for private schools which are segregated adventitiously as when their "flight" is to private schools which are segregated as a matter of school policy.[10] Therefore, we affirm the decision of the district court not to distinguish among segregated schools on the basis of their admissions policies.[11]

II.

NON-SCHOOL ORGANIZATIONS

The district court also enjoined the City of Montgomery fom permitting the use of municipal recreational facilities by all private organizations, including churches, civic clubs, social, fraternal, and charitable societies, which have a "racially discriminatory ad-

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[10] *Cf.* King, *Rebuilding the "Fallen House" — State Tuition Grants for Elementary and Secondary Education*, 84 Harv. L. Rev. 1057, 1081 (1971).

[11] We need not reach the question of what degree of actual desegregation of a private school student body might deprive a court of its discretion to find that the effect of public involvement with such a private school is inconsistent with the due performance by public officials of their prior court ordered duty to achieve a unitary public school system. That issue is not presented in this case. Nor do we attempt to predict whether, as substantial accomplishment of the mandate to establish a unitary school system occurs, the adverse effect of private school use of public facilities may diminish or disappear, thus making the present injunction no longer appropriate. Cf. Wright v. City of Emporia, *supra*, 407 U.S. at ——, 92 S.Ct. at 2207 [headnotes 15, 16].

missions policy."[12] This part of the injunction involves very different considerations from the preceeding sections dealing with segregated private schools and school affiliated groups. While the injunction against private school usage is based upon the affirmative obligation of public authorities to eliminate educational segregation, the injunction against similar usage by non-school organizations must rest, if at all, upon a general constitutional prohibition against state-sponsored racial discrimination.

Subsequent to the decision below, the Supreme Court delivered its opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), involving the constitutionality of granting a state liquor license to a fraternal organization with a racially discriminatory membership policy. In *Irvis*, the Supreme Court reversed an injunction forbidding licensing the Moose Lodge until it ceased its discriminatory practices. In so doing, the Court pointed out:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, wa-

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[12]The district court made no findings about the history, frequency, or effects of public recreational facilities by such non-school affiliated private organizations. Furthermore, in this case which was tried on stipulated facts nothing was stipulated which would support this prong of the injunction.

> ter, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases [109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883)] and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," Reitman v. Mulkey, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971. Distinguishing its earlier decisions involving state-supported discriminatory refusal of service in private restaurants, *Peterson v. City of Greenville*, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the court held that the state licensing of the Harrisburg Moose Lodge did not significantly affect the right of minority groups to purchase liquor or to obtain club licenses for themselves. 407 U.S. at ____, 92 S.Ct. at 1973.

Irvis requires reversal of that portion of the district court's order which deals with non-school affiliated groups. *Irvis* involved the licensing of an otherwise private club located in a private building, while the present case involves the use of publicly owned recreational facilities. The use of public property brings this

ase closer to the facts of *Burton*. There are, however, wo controlling distinctions. First, the periodic use of ecreational facilities by private clubs does not approach the "symbiotic relationship" between the public parking authority and the private lessee that was resent in *Burton*. Second, *Burton* involved a restaurant holding itself out as a place of public accomodation. The injunction in the present case, like the injunction in *Irvis*, affects bona fide private social and eligious organizations. The freedom to choose one's ssociates in private clubs, churches, and civic organations is an important constitutional right and a basic principle of our pluralistic society. *See, e.g., Evans v. Newton*, 382 U.S. 296, 298-299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966); *NAACP v. Button*, 371 U.S. 415, 444-45, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L. J. 1 (1964). Where there is no significant effect on the countervailing rights of excluded individuals,[13] such private groups cannot be denied access public recreational facilities solely because of their discriminatory admissions policies.[14] *Cf. Sherbert v. Ver-*

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[13] *Compare* Wesley v. City of Savannah, 294 F.Supp. 698 (S.D. Ga. 1969). *Cf.* Falkenstein v. Dept. of Revenue for the State of Oregon, ——— F. Supp. ———, 41 U.S.L.W. 2282 (D. Ore. 1972); McGlotten v. Connally, 338 F.Supp. 448 (D. D.C. 1972); Pitts v. Dept. of Revenue for the State of Wisconsin, 333 F.Supp. 662 (E.D. Wisc. 1971).

[14] This case does not involve any evasion of the city's responsibility to operate recreational facilities on a desegregated basis by the subterfuge of converting such facilities to private control. *See, e.g.*, Hampton v. City of Jacksonville, 304 Fed. 320 (5th Cir.), *cert. denied*, 371 U.S. 911, 83 S.Ct. 256, 9 L.Ed.2d 170 (1962); *Cf.* Palmer v. Thompson, 403 U.S. 217, 222-23, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971).

ner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

III.

CONCLUSION

On remand, the district court is directed to limit its injunctive order by deleting paragraphs 3 and 4 relating to private non-school groups, clubs and organizations and by amending paragraphs 1 and 2 to make clear that the City of Montgomery is not prohibited from permitting nonexclusive access to public recreational facilities and general government services by private schools or school affiliated groups.

REMANDED, with direction

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

ORDER

This case now is submitted upon plaintiffs "Motion for Supplemental Relief" wherein they contend that they are deprived of constitutional rights under the Fourteenth Amendment to the United States Constitution by the City of Montgomery's policy and practice of permitting racially segregated private schools and other segregated groups to use city recreational facilities.[1/] Plaintiffs ask that the Court declare the city's policy and practice unconstitutional and enjoin the city from allowing or in any way sanctioning the use of its recreational facilities by any private school or other private group which is racially segregated or which has a racially discriminatory admissions policy.

[1/] The original case concerned the desegregation of all public recreational facilities operated by the City of Montgomery. This Court's opinion and injunction are reported in *Gilmore v. City of Montgomery*, 176 F.Supp. 776 (M.D. Ala. 1959), affirmed as modified in *City of Montgomery, Alabama v. Gilmore*, 277 F.2d 364 (5th Cir. 1960)

In opposition to this motion, defendants deny that the city's practice of making city owned or operated facilities open and available to all people, regardless of race, violates plaintiffs' constitutionally protected rights. The facts relevant to plaintiffs' motion are stipulated and the motion is now submitted upon the pleadings, stipulation and briefs.

The City of Montgomery makes its football, basketball and baseball facilities available on a nondiscriminatory basis to private groups who apply for them. Such private groups include schools, churches, civic clubs and charitable organizations. Among the private schools taking advantage of the city's generosity are St. James School, the Stephens-Spear School, Central Alabama Academy and the Montgomery Academy. Of these schools only Stephens-Spear has a published discriminatory admissions policy. The Montgomery Academy and St. James School have "declared" open enrollment policies.[2/]

[2/] This Court emphasizes the word "declared"

As to these and all other segregated private schools, the city's aid is unconstitutional. The Court is unable to distinguish the present case from those cases which struck down state statutues providing tuition grants to students attending private schools. If a tuition grant case arose in a state previously subject to *de jure* segregation, two elements, in addition to state aid, always were present. Initially, the state's school boards were under an affirmative constitutional duty to desegregate, and, secondly, the effect of the state tuition grant scheme was to frustrate the right of Negroes to attend a desegregated public school by permitting white students to escape to segregated private schools. E.g., *Coffey v. State Educ'l Finance Comm'n,* 296 F.Supp. 1389 (S.D. Miss. 1969) (three judges); *Poindexter v.*

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because these schools have no Negroes in attendance. As a matter of fact, none of the private schools that are using these public facilities have Negro students or teachers.

Louisiana Financial Assis. Comm'n, 275 F.Supp. 833 (E.D. La. 1967) (three judges), *aff'd,* 389 U.S. 571 (1968). Each of these elements is present in the case *sub judice*. Clearly, Montgomery is providing aid to private, segregated schools, thus encouraging and facilitating their establishment and operation as an alternative for white students who in most instances are seeking to avoid desegregated public schools. In addition, Montgomery school board and all other city governmental officials are under an affirmative constitutional duty to desegregate. See *McNeal v. Tate Co. School District,* 5th Cir. No. 30722, September 17, 1971.

This Court considers irrelevant the amount of city aid provided to the private schools. The applicable standard was enunciated in a tuition grant case, *Griffin v. State Bd. of Educ.,* 296 F.Supp. 1178 (E.D. Va. 1969) (three judges), where the court said: "[A]*ny* assist *whatever* by the state towards provision of a racially segregated education exceeds the pale of tolerance

demarked by the Constitution. . . . In our judgment, . . . [t]he *effect* of the State's contribution is a sufficient determinant. . ." Thus, this Court concludes from *Griffin* that what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but that the *extent* of the aid provided is immaterial.

Even if one assumes, however, that the degree of aid is relevant, the aid provided in the present case is substantial and it significantly affects the Montgomery public school system. The opportunity to participate in sports contributes considerably to the attractiveness of any school and thereby enhances enrollments while, in the instances now presented, drawing students away from the public school system. In addition, the city saves private schools money by furnishing them a place to play free of charge. The cost of buying land and maintaining a football field, or of building a gymnasium, requires a substantial financial outlay. The money saved, or course, is being used to operate these private, segregated

institutions. Even more significant, the city's aid in this case provides a means by which the school can raise extra revenue through the sale of tickets and refreshments. Needless to say, the creation and operation of these private, segregated schools is to the detriment of a racially balanced public school system in Montgom Alabama.

The City attempts to justify its action on the ground that it makes its facilities available to all groups regardless of race, and thereby, maintains a racially neutral policy with respect to private discrimination. Such conduct by the city, however, is not legally sufficient. In *Griffin, supra*, even though no invidious purpose or intent on the part of the state was demonstrabl and even though the tuition program provided grants for which both blacks and whites in private schools were equally eligible, the court voided the state statute because, in effect, the tuition scheme tended to frustrate the opportunity of

Negroes to attain public education in a desegregated institution. The court said: "In our judgment, it follows that neither motive nor purpose is an indispensable element of the breach." *McNeal v. Tate Co. School Dist., supra,* also is pertinent to the issue involved here. In that case, the Fifth Circuit set aside the sale of a public school building to an all-white private school, although the school board that sold the property acted in good faith and did not know that the private school discriminated against Negroes. The Court said: "[S]chool boards are charged with the *affirmative* duty to take whatever steps might be necessary to bring about a unitary educational system which is free from racial discrimination. . . . That duty includes making some sort of reasonable investigation of prospective purchasers. . . ." In the instant case, the Montgomery City officials are charged with an affirmative duty to bring about and maintain a desegregated public school system.

Providing aid to segregated private schools is incompatible with that constitutional obligation. Thus, it becomes apparent that Montgomery's policy of making its facilities available to all schools without regard to racial composition, does not constitute a defense to the present action.

Neither does a private, segregated school's "declared" nondiscriminatory, open admissions polic constitute a defense to the city's aiding that school. The test is whether the city's aid frustrates the right of black citizens to a desegregated public education. When the effect upon that right is the same, no difference in constitutional result should exist. Therefore, regardless of the school's "declared" admissions policy, the mere fact of its segregation renders any state aid to it unconstitutional.

As to that aspect of plaintiffs' motion relating to private clubs and organizations other than those affiliated with private schools, this Court feels the test should be somewhat different. Whereas state and city officials are under an affirmative obligation to end discrimination i

situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools. Consequently, although state aid to such a group is unconstitutional if the organization discriminated on the basis of race, the mere fact that such an organization is segregated is not enough to render state aid to it *per se* constitutionally improper.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each

is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

5. That the costs of this proceeding be and the same are hereby taxed against the defendants.

Done, this the 18th day of January, 1972.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

. . . . . .

WRIT OF INJUNCTION

To the above-named defendants:

TAKE NOTICE that you and each of you, your officers, agents, servants, employees, and those acting in concert with you, be and you are hereby ENJOINED as more particularly set out in the order of this Court made and filed herein on this date, a copy of which is herewith served upon each of you by certified mail.

WITNESS my hand and the seal of this Court at Montgomery, Alabama, on this the 18th day of January, 1972.

Jane P. Gordon
Clerk of the United States District Court
for the Middle District of Alabama

(SEAL)

By: s/ Marie Thurman
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDL

DISTRICT OF ALABAMA, NORTHERN DIVISION

GEORGIA THERESA GILMORE ET AL.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 1490-N
CITY OF MONTGOMERY, ALABAMA, ET AL.,	)	
Defendants.	)	

ORDER

Upon consideration of the opinion of the United States Court of Appeals for the Fifth Circu rendered in this cause February 9, 1973, and the mandate of that Court received by the Clerk of this Court on March 6, 1973, it is the ORDER, JUDGMENT and DECREE of this Court that the injunctive order of this Court made and entered January 18, 1972, be and the same is hereby amended as follows:

By deleting paragraphs 3 and 4 relating to private, non-school groups and organizati

It is further ORDERED that paragraphs 1 and 2 of the said injunctive order be and each is hereby amended by adding:

> The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups.

Done, this the 19th day of March, 1973.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

(SEAL)